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Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL., *Respondents*.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners*,

v.

STATE OF HAWAII, ET AL., *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF FOR SCHOLARS OF FEDERAL JURISDICTION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are legal scholars who study the scope and limits of federal judicial power.[2] Their interest in these appeals arises from the important questions that the appeals present in relation to mootness. Amici urge the Court to dismiss the appeals as moot but forbear from vacating the judgments below under the narrow doctrine announced in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

STATEMENT

These appeals arise from the government's challenges to preliminary injunctions barring enforcement of certain provisions of an executive order dated March 6, 2017 that sought to (i) temporarily ban entry into the United States of noncitizens from several predominantly Muslim countries for 90 days, (ii) suspend refugee admissions under the U.S. Refugee Admissions Program ("USRAP") for 120 days, and (iii) reduce the number of refugees to be admitted in fiscal year 2017.

A. January Executive Order

On January 27, 2017, President Donald J. Trump signed Executive Order No. 13,769, "Protecting the Nation From Foreign Terrorist Entry Into the United States." 82 Fed. Reg. 8977 (Jan. 27, 2017) ("EO-1").

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[1] No counsel for a party authored any portion of this brief, and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have filed a blanket letter of consent. Respondents the International Refugee Assistance Project and the State of Hawaii have consented to the filing of this brief.

[2] A complete list of amici is set forth in the appendix to this brief.

The immediate effects of EO-1 included, among other things, suspending the entry of noncitizens from seven predominantly Muslim countries for a period of 90 days. *See* EO-1, § 3(c) (suspending entry of noncitizens from Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen). EO-1 instructed the Secretary of State, Secretary of Homeland Security, and Director of National Intelligence to review those countries' procedures for vetting applicants for admission to the United States and to assess the information used to determine whether noncitizens seeking entry posed a national security risk. *See, e.g., id.* § 3(a)-(b), (h). Other provisions of EO-1 reduced the number of refugees to be admitted to the United States in fiscal year 2017 from 110,000 to 50,000 and suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days. *See* EO-1, § 5(a), (c)-(d). The President's actions substantially effectuated his well-publicized proposal as a presidential candidate to implement a "total and complete shutdown of Muslims entering the United States." JA 478.

EO-1 was promptly challenged and, in February 2017, the U.S. District Court for the Western District of Washington enjoined enforcement of certain provisions of the order. *See Washington* v. *Trump*, 2017 WL 462040, at *2 (W.D. Wash. Feb. 3, 2017). The district court enjoined enforcement of, *inter alia*, Sections 3(c) (suspending entry from listed countries for 90 days) and 5(a) (suspending USRAP for 120 days). The Ninth Circuit declined to stay the district court's decision pending appeal. *See Washington* v. *Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017) (per curiam).

No injunction issued concerning EO-1's requirements relating to any internal executive review of current procedures and informational needs associated

with the adjudication of visas, admissions, or other immigration benefits. *See, e.g.*, EO-1, §§ 3(a)-(b), 3(h).

B. March Executive Order

On March 6, 2017, the President signed a second, superseding Executive Order ("EO-2"), also captioned "Protecting the Nation from Foreign Terrorist Entry Into the United States." Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). After the President signed EO-2, the government sought (and obtained) dismissal of the Ninth Circuit proceedings relating to EO-1 rather than seek *en banc* or certiorari review.

Like EO-1, EO-2 restricted entry of most noncitizens from enumerated predominantly Muslim countries for a period of 90 days "from the effective date of th[e] order." EO-2 differed in that it did not apply to Iraqi nationals. EO-2, § 2(c).[3] Like EO-1, EO-2 instructed national security agencies to conduct a review to determine what information was needed to assess whether individuals seeking admission from other countries posed a threat to national security. *Id.* § 2(b). EO-2 also suspended USRAP for a 120-day period "from the effective date of th[e] order," and reinstated the reduction to 50,000 of the number of refugees to be admitted to the United States in fiscal year 2017. *Id.* §§ 6(a)-(b). Section 14 of EO-2, entitled "Effective Date," provided that EO-2 would take effect on March 16, 2017. *Id.* § 14.

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[3] EO-2 exempted several categories of persons—such as lawful permanent residents of the United States—whose due process rights the Ninth Circuit had concluded were violated by EO-1. *See Washington*, 847 F.3d at 1165-1166. Alluding to these exemptions, the President publicly described EO-2 as "a watered-down version of [EO-1]." JA 183.

EO-2 was likewise immediately challenged. On March 15, 2017, the U.S. District Court for the District of Hawaii enjoined Sections 2 and 6 of EO-2 in their entirety, including the internal review and reporting provisions in, for example, Sections 2(a), (b), (d), and (e). On the same day, the U.S. District Court for the District of Maryland separately enjoined Section 2(c)'s 90-day entry ban, but unlike the district court in *Hawaii*, did not extend the injunction to include any of the review and reporting provisions in Section 2. On May 25, 2017, the *en banc* Fourth Circuit affirmed the latter ruling in relevant part. *See International Refugee Assistance Project* v. *Trump*, 857 F.3d 554, 604-606 (4th Cir. 2017) (en banc) ("*IRAP*"). On June 12, 2017, the Ninth Circuit lifted the injunction on enforcement of Section 2's internal review and reporting provisions, but affirmed the injunction as to Sections 2(c), 6(a), and (b). *See Hawaii* v. *Trump*, 859 F.3d 741, 757 (9th Cir. 2017).

On June 13, 2017, the government filed a consent motion in the *Hawaii* case, requesting that the mandate issue immediately so that the "Government may then implement" the review provisions of Sections 2 and 6 of EO-2. Consent Mot. To Issue Mandate 3-4, Doc. 316, *Hawaii* v. *Trump*, No. 17-15589 (9th Cir. filed June 13, 2017). The Ninth Circuit granted that motion on June 19, 2017.

Since June 19, 2017, no injunction or other judicial restraint has limited the government's ability to implement the internal executive review and reporting procedures of Sections 2 and 6 of EO-2.

C. June 14 Memorandum

The government petitioned for writs of certiorari in the *Hawaii* and *IRAP* cases and moved to stay the lower courts' injunctions. In opposing certiorari, respondents argued that any challenge to Section 2(c) of EO-2 would be moot before the Court could hear it because, by its own terms, Section 2(c) expired at 12:01 a.m., Eastern Daylight Time on June 14, 2017, 90 days after the "effective date of th[e] order," which was 12:01 a.m., Eastern Daylight Time on March 16, 2017. EO-2, §§ 2(c), 14.

Apparently in response to that argument, on June 14, 2017, after Section 2(c) had already expired at 12:01 a.m. that same day, the President issued a memorandum declaring that the "effective date" of EO-2's enjoined provisions would be "the date and time at which the referenced injunctions are lifted or stayed with respect to that provision." JA 1442 ("Memorandum"). The Memorandum further stated that it "should be construed to amend" EO-2 "[t]o the extent it is necessary." *Id.*

D. This Court's June 26 Order

On June 26, 2017, this Court granted certiorari, consolidated the *Hawaii* and *IRAP* appeals, and stayed the appealed injunctions of EO-2's operative provisions insofar as they applied to foreign nationals with "no connection to the United States at all." *Trump* v. *International Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (per curiam). The Court stated:

> In light of the June 12 decision of the Ninth Circuit vacating the injunction as to § 2(a), the executive review directed by that subsection may proceed promptly, if it is not already underway. EO-2 instructs the Secretary of

> Homeland Security to complete this review within 20 days, after which time foreign governments will be given 50 days further to bring their practices into line with the Secretary's directives. §§ 2(a)-(b), (d).

Id. at 2088-2089. The Court noted that it "fully expect[ed] that the relief we grant today will permit the Executive to conclude its internal work and provide adequate notice to foreign governments within the 90-day life of § 2(c)." *Id.* at 2089.

The Court's June 26 order also directed the parties, in briefing the appeal, to address whether the challenges to Section 2(c) became moot on June 14, 2017. 137 S. Ct. at 2086-2087. No party has argued to this Court that the challenges are moot.

E. Implementation Of The March Executive Order

After the mandate issued in the *Hawaii* case on June 19, 2017, the government began to implement the review and reporting processes required by EO-2. On June 29, senior administration officials confirmed that "review of additional procedures for vetting of refugees ... began ... on June 23rd."[4] On or about July

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[4] U.S. Dep't of State, *Background Briefing on the Implementation of Executive Order 13780 Protecting the Nation From Foreign Terrorist Entry Into the United States* (June 29, 2017), *available at* https://www.state.gov/r/pa/prs/ps/2017/06/272281.htm; *see also* U.S. Dep't of Homeland Security, *Frequently Asked Questions on Protecting the Nation from Foreign Terrorist Entry into the United States* (June 29, 2017), https://web.archive.org/web/20170629221445/https://www.dhs.gov/news/2017/06/29/frequently-asked-questions-protecting-nation-foreign-terrorist-entry-united-states (indicating that review of the USRAP application and adjudication processes was "underway").

10,[5] the Department of Homeland Security ("DHS") issued its Section 2(b) report to the President concerning the results of the worldwide review described in Section 2(a). On September 11, a spokesperson stated that DHS would provide a further report "in the coming weeks."[6] At that time the State Department was "engaging with foreign governments to meet ... new standards for information sharing."[7] At least some of the consequences of the required review have already emerged. For example, USCIS will begin expanding in-person interviews for certain applicants for permanent residency effective October 1 to "compl[y] with Executive Order 13780."[8]

The government began implementing Section 2(c)'s 90-day travel restriction within 72 hours of this Court's June 26 ruling—*i.e.*, no later than June 29, 2017. JA 1442; *see also* Opp. To Emergency Mot. 6, *Hawaii* v. *Trump*, No. 17-50 (D. Haw. filed July 3, 2017) (Doc.

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[5] *See* Culliford, *U.S. Demands Nations Provide More Traveler Data or Face Sanctions*, Reuters (July 13, 2017), *available at* http://live.reuters.com/Event/Live_US_Politics/1012197528 (quoting cable that "outlines the results of the report submitted to the President on July 10").

[6] Zapotosky, *Supreme Court allows broad enforcement of travel ban—at least for a day*, Wash. Post (Sept. 11, 2017), https://www.washingtonpost.com/world/national-security/justice-dept-again-asks-supreme-court-to-allow-broad-enforcement-of-travel-ban/2017/09/11/6c3853ae-970b-11e7-87fc-c3f7ee4035e9_story.html?utm_term=.b7b019502bf6.

[7] *Id.*

[8] USCIS, *USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants* (Aug. 28, 2017), https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants.

301). A June 26 DHS press release explained that the "granting of a partial stay of the circuit injunctions ... has allowed the Department of Homeland Security to largely implement the President's Executive Order."[9] Two days later, the State Department promulgated guidance concerning implementation of EO-2 in a cable to visa-adjudicating posts.[10] The cable stated that "implementation of [EO-2] sections for which injunctions have been lifted will begin June 29, 2017."[11]

More specifically, the cable stated that Section 2(c)'s "90-day suspension of entry will be implemented worldwide at 8:00 p.m. Eastern Daylight Time (EDT) June 29, 2017."[12] The June 28 cable also stated that the USRAP refugee program "is suspended for 120 days."[13]

SUMMARY OF ARGUMENT

These appeals concern the government's challenge to preliminary injunctions against enforcement of three specific provisions of EO-2. That challenge is or shortly will be moot.

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[9] *See* DHS, Press Release, *DHS Statement On U.S. Supreme Court Decision On The President's Executive Order On Protecting The Nation From Foreign Terrorist Entry Into The United States* (June 26, 2017), https://www.dhs.gov/news/2017/06/26/dhs-statement-us-supreme-court-decision-president-s-executive-order-protecting.

[10] *See* Sec'y, U.S. State Dep't, *(SBU) Implementing Executive Order 13780 Following Supreme Court Ruling—Guidance to Visa-Adjudicating Posts* (June 28, 2017), *available at* http://live.reuters.com/Event/Live_US_Politics/989297085.

[11] *Id.*

[12] *Id.*

[13] *Id.*

By their terms, two of the provisions at issue expired months ago. EO-2 states, in a provision never enjoined by any court, that its "effective date" was March 16, 2017. Sections 2(c) and 6(a) were due to expire within 90 and 120 days, respectively, of that effective date and those time periods now have run.

Independently, all three contested provisions of EO-2 began to be implemented when this Court stayed the injunctions in its June 26, 2017 decision. Even assuming Sections 2(c), 6(a), and 6(b) were not "effective" until June 26, all three provisions will have run their course before or shortly after this Court hears oral argument. The government's challenge to the injunctions accordingly no longer presents a live case or controversy (or shortly will cease to do so), thus mooting the appeals.

Given that the appeals are or shortly will be moot, the only remaining question is whether the Court should vacate the judgments of the courts of appeals. The Court should not do so. The mootness of these cases has nothing to do with the "vagaries of circumstance," and everything to do with the government's choice to impose the restrictions in question for only a short period, and by its conscious, strategic, and voluntary decisions not to expedite litigation during that period. "The case is therefore one where the United States, having slept on its rights, now asks [the Court] to do what by orderly procedure it could have done for itself." *Munsingwear*, 340 U.S. at 41. Accordingly, the correct course is to dismiss the petitions for certiorari while leaving the judgments below in place.

ARGUMENT

I. MOOTNESS IS A THRESHOLD JURISDICTIONAL ISSUE THAT MUST BE ADDRESSED BEFORE THE MERITS

The "exercise of judicial power depends upon the existence of a case or controversy." *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964). This requirement reserves federal courts' power for controversies that are "definite and concrete" and "touch[] the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937). The "case or controversy" requirement "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984).

Mootness doctrine bars the federal courts from considering cases in which "'the parties lack a legally cognizable interest in the outcome.'" *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 287 (2000) (quoting *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979)). This Court has accordingly recognized that mootness is "a jurisdictional question because the Court is not empowered to decide moot questions or abstract propositions." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (per curiam) (internal quotation marks omitted). Because "moot questions require no answer," *Missouri, Kan. & Tex. Ry. Co.* v. *Ferris*, 179 U.S. 602, 606 (1900), resolution of a controversy that has become moot "amount[s] to no more than an advisory opinion," which federal courts are without power to provide, *Boston Firefighters Union Local 718* v. *Boston Chapter NAACP, Inc.*, 468 U.S. 1206, 1210 (1984).

Mootness at any stage of litigation forecloses judicial review—even if a justiciable question existed at an earlier time. *See, e.g., Arizonans for Official English* v.

Arizona, 520 U.S. 43, 67 (1997) ("[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."); *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (per curiam) (dispute was moot because "[t]he case [] lost ... its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law").

Mootness may arise, as in these appeals, in the context of an appellate challenge to a preliminary injunction. *See, e.g.*, *Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985); *University of Tex.* v. *Camenisch*, 451 U.S. 390, 394 (1981). In such an appeal, the only issue before the Court is "whether the preliminary injunction should have issued." *Honig*, 471 U.S. at 149. Once the enjoined conduct has ceased, "the correctness of the decision to grant [the] injunction ... is moot." *Camenisch*, 451 U.S. at 394. Where the injunction tied to the conduct "expired by its own terms, ... there remain for this Court no actual matters in controversy." *Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO* v. *Missouri*, 361 U.S. 363, 367 (1960) (internal quotation marks omitted); *see also Burke* v. *Barnes*, 479 U.S. 361, 363 (1987) (legislators' challenge to pocket veto was mooted when "[t]he bill in question expired by its own terms"); *Alejandrino* v. *Quezon*, 271 U.S. 528, 532 (1926) (action to enjoin legislator's disciplinary suspension was mooted when suspension expired).

II. These Appeals Will Be Moot Before (Or Very Shortly After) The Court Hears Oral Argument

A. According to EO-2's stated "Effective Date," Sections 2(c) and 6(a) expired months ago. Section 14 of EO-2 states that the order "is effective at 12:01 a.m.,

eastern daylight time on March 16, 2017." EO-2, § 14. Section 2(c), in turn, suspended entry into the United States of designated individuals "for 90 days from the effective date of this order." *Id.* § 2(c). Thus, as the government initially conceded, "Section 2(c)'s 90-day suspension" presumptively "expire[d] in early June," specifically at 12:01 a.m. Eastern Daylight Time on June 14, 2017. Gov't Stay Mot. 11, *International Refugee Assistance Project* v. *Trump*, No. 17-1351 (4th Cir. filed Mar. 24, 2017) (Doc. 35). Similarly, Section 6(a) of EO-2 suspended refugee travel and decisions on applications for refugee status "for 120 days after the effective date of this order." On its own terms, therefore, Section 6(a) expired on July 14, 2017. Expiration of these two provisions of EO-2 mooted the government's challenge to the injunctions against their implementation.

The government identifies no basis for disagreement with this straightforward view of the order's plain terms and their effect. It merely points to EO-2 itself, along with unspecified "background legal principles" and "common sense," to support its contention that the preliminary injunctions issued in March somehow "delayed or tolled" the 90-day period specified in Section 2(c). Pet. Br. 36. But nothing in EO-2 contemplates any delay or "tolling" of the time periods provided in Sections 2(c) and 6(a), much less suggests that those two provisions could be tolled while other provisions of EO-2 remained subject to "the effective date of th[e] order" that the order itself specifies, *i.e.*, March 16, 2017. Instead, EO-2 directs that entry be suspended "temporarily" during a fixed, discrete interval commencing at 12:01 a.m. Eastern Daylight Time on March 16, 2017, and ending 90 days later, to facilitate the "review" described in Section 2(a)—which, as explained above (pp. 6-8), has proceeded notwithstanding the in-

junctions. It is entirely consistent with "common sense" to conclude that EO-2 means what it says: when the specified interval ends, so does any suspension of entry. The same conclusion applies equally to Section 6(a)'s suspension of refugee travel and status decisions. That the lower courts enjoined enforcement of these provisions should not prompt this Court to extend their effective dates or imply a tolling provision that EO-2's plain terms do not contemplate. This is especially true where the government has treated the order as "effective" all along, by implementing other, complementary requirements of EO-2.[14]

Nor does the President's June 14 Memorandum "put[] the issue to rest," as the government contends. Pet. Br. 37. *First*, the Memorandum issued on June 14, 2017, *after* Section 2(c)'s suspension of entry had already expired at 12:01 a.m. that same day. The Memorandum purported to "provide[] guidance" concerning Section 2(c) or, if necessary, "amend" that provision "[i]n light of questions in litigation." JA 1441-1442. But by the time the Memorandum issued, there was no effective provision suspending entry as to which the Memorandum could provide guidance or effect an amendment. The government has articulated no reason the Court should construe Section 2(c) as surviving the very expiration that the June 14 Memorandum (belatedly and ineffectively) sought to address.

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[14] *See, e.g.*, DeChiaro, *Travelers From Six Muslim Countries Drop Without Travel Ban*, Roll Call (June 12, 2017), https://www.rollcall.com/news/policy/travelers-six-muslim-countries-drop-without-travel-ban (noting DHS "implemented some new vetting procedures in accordance with a section of the March 6 order that was not affected by the courts"; quoting DHS press secretary as stating "'Section 5 allows us to continue to work on uniform vetting and screening procedures for all countries'").

Second, to the extent the government contends that the Memorandum somehow resuscitated the defunct Section 2(c), or amended Section 6(a) so as to forestall its expiration, it did neither. 8 U.S.C. § 1182(f), which the President invoked as authority for issuing EO-2, requires him to act "by proclamation." Thus, the suspension power historically has been exercised by proclamation, and in some instances by executive order. Manuel, Cong. Research Serv., R44743, *Executive Authority to Exclude Aliens: In Brief* 6-10 (2017) (listing executive orders and proclamations). Both are formal documents that require a specific recitation and must be reviewed by the Director of the Office of Management and Budget and the Attorney General before they are final. *See* 1 C.F.R. Part 19 (setting forth requirements for executive orders and proclamations); Exec. Order No. 11,030 (governing preparation of executive orders and proclamations); Exec. Order No. 11,354 (amending EO 11,030).

Plainly, the Memorandum is not a proclamation or executive order. It omits the recitation required by 1 C.F.R. § 19.1(g), and there is no indication the Memorandum was subject to review by the Director of the Office of Management and Budget and the Attorney General. These requirements are not trivial. The D.C. Circuit recognized as much when it rejected a challenge to certain presidential action as insufficiently formal because there was no "relevant statute or judicial decision requiring the President [when taking such action] to act by Executive Order or any other formal proclamation." *American Fed'n of Gov't Employees, AFL-CIO* v. *Carmen*, 669 F.2d 815, 820 n.27 (D.C. Cir. 1981). Here, by contrast, a "relevant statute," Section 1182(f), expressly constrains the President to proceed formally. An exercise of the suspension power by

memorandum therefore would constitute an impermissible end run around statutory requirements. The Ninth Circuit recognized this in rejecting a purported modification of EO-1 via "[a]uthoritative [g]uidance." *Washington*, 847 F.3d at 1166. The same fate should meet any attempt to rescue or amend Sections 2(c) and 6(a) of EO-2 by means other than an actual proclamation or executive order.

B. Even if the June 14 Memorandum somehow salvaged Sections 2(c) and 6(a) from becoming moot, all three contested provisions will cease to be effective by the time this Court hears argument or shortly thereafter. That is because, on the government's own reading of EO-2 and the Memorandum, Sections 2(c), 6(a), and 6(b) of EO-2 became operative as of "the date and time at which the ... injunctions [we]re lifted or stayed with respect to [each] provision"—specifically, on the morning of June 26, when this Court issued its ruling staying the appealed-from injunctions. *See Trump* v. *International Refugee Assistance Project*, 137 S. Ct. 2080, 2087-2089 (2017).

Put differently, even taking June 26 (rather than March 16) as the effective date of Section 2(c), that provision's entry-suspension policy will lapse 90 days later, *i.e.*, on September 24, 2017. Similarly, Section 6(a), which suspends the admission of refugees under USRAP for "120 days from the effective date of [the] order," will expire on October 24, 2017.[15] And Section

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[15] Even if the Court concludes that mootness doctrine does not prevent it from adjudicating the government's soon-to-be-moot challenge to Section 6(a), an important prudential question exists whether the Court should "decide such momentous constitutional issues based on a request for such narrow and temporary relief." *ACLU* v. *Clapper*, 804 F.3d 617, 626 (2d Cir. 2015); *see also Darr* v. *Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J.,

6(b), which limits the entry of refugees to no "more than 50,000 [] in fiscal year 2017" will have no effect after September 30, the last day of the 2017 fiscal year. *See, e.g.*, S. Rep. No. 114-264, at 1 (2017) ("[M]aking appropriations ... for the fiscal year ending September 30, 2017[.]"). Accordingly, even to the extent the provisions at issue have not already expired, all three will shortly do so, mooting the appeals.[16]

As set forth in detail above (pp. 6-8), the government's own statements confirm that it implemented Sections 2(c), 6(a), and 6(b) after this Court's June 26

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dissenting) ("Petitions [] have been denied because, even though serious constitutional questions were raised, it seemed ... that time would soon bury the question[.]").

[16] *See* Litman, *Symposium: The mootness games*, SCOTUSblog (July 11, 2017), http://www.scotusblog.com/2017/07/symposium-mootness-games/ ("[T]he case will likely be moot by the time the court hears argument in the fall, or reaches a decision."); Rappaport, *Travel ban issue will be moot before SCOTUS date—here's why*, TheHill (June 28, 2017), http://thehill.com/blogs/pundits-blog/immigration/339825-travel-ban-will-be-moot-before-it-reaches-supreme-court-heres ("This will moot the travel ban issues before the [C]ourt reconvenes to hear arguments on the merits of the case."); Lederman, *It's All About that Stay (and Its Surprising Limits)*, Just Security (June 26, 2017), https://www.justsecurity.org/42550/stay-or-lack-thereof/ ("No, the case will be moot for two other reasons: For one thing, the 90-day entry ban goes into effect 72 hours from now, at least as to some aliens (see below), and thus it will expire by its terms on September 27. Moreover, as the Court explains, by October the Section 2 "internal review" should be completed ... and therefore the predicate for the entry ban will be kaput by then, too."); Epps, *Trump's Limited Travel Ban Victory*, Atlantic (June 26, 2017), https://www.theatlantic.com/politics/archive/2017/06/the-trump-administrations-limited-victory/531708/ ("[T]he court merely granted review, and delayed actual consideration of the case until the opening of next October's term—by which time the specific issue will most likely be moot.").

order issued, conclusively demonstrating that those provisions "took effect" no later than that date. In an "Important Announcement" published on July 14, for example, the U.S. Department of State's Bureau of Consular Affairs clarified that it "began implementing [EO-2] at our embassies and consulates abroad in compliance with the Supreme Court's decision and in accordance with the Presidential Memorandum issued on June 14, 2017." U.S. Dep't of State, *Important Announcement: Executive Order on Visas*, https://travel.state.gov/content/travel/en/news/important-announcement.html (last visited Sept. 18, 2017).

In addition, the government has explained that Sections 2(c), 6(a), and 6(b) were designed "to operate in tandem with the parallel reviews," Reply Br. in Support of Application for Stay Pending Appeal 5, prescribed in EO-2 to "assess whether current ... procedures are adequate to detect terrorists seeking to infiltrate the Nation," EO-2, § 1(f). The government has been free to implement—and indeed has implemented—those review procedures since at least June 19. *See supra* pp. 6-8. The parallel review of admission procedures that was the predicate for the contested provisions of EO-2 will be complete either by the time this Court hears argument or shortly thereafter.

C. No exception to the doctrine of mootness applies. The appeals do not fall within "the established exception to mootness for disputes capable of repetition, yet evading review." *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). That exception applies "only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *City of Los Angeles*

v. *Lyons*, 461 U.S. 95, 109 (1983). Here, the challenged conduct is not "capable of repetition" within the meaning of the exception because there is no "reasonable showing" that similarly situated individuals "will again be subjected to the alleged illegality." *Id.*

Although the President could theoretically issue a new order (or extend the existing order) in the future, "'[s]uch speculative contingencies afford no basis for [the Court's] passing on the substantive issues ... with respect to the' now-expired provisions." *Burke*, 479 U.S. at 364-365 (quoting *Hall*, 396 U.S. at 49-50); *see also Rendell* v. *Rumsfeld*, 484 F.3d 236, 242 (3d Cir. 2007) ("[i]t would be speculation upon speculation were one to attempt a prediction" about possible repetition); *cf. Super Tire Eng'g Co.* v. *McCorkle*, 416 U.S. 115, 123-124 (1974) (finding policy was capable of repetition because it was not "contingent upon executive discretion"). And even if any such new order (or extension of the existing order) might overlap with the one at issue in these appeals, it would nonetheless require a fresh assessment by the lower courts of any material differences in the factual record and evidentiary basis for the new (or renewed) order. *See, e.g., Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 193 (2000) (with respect to actions that "took place after the Court of Appeals issued its decision" and "the prospect of future violations," finding that "[t]hese issues have not been aired in the lower courts; they remain open for consideration on remand"); *Fortson* v. *Toombs*, 379 U.S. 621, 622 (1965) (declining to resolve mootness issues arising on appeal where "the situation

... changed somewhat" since the trial court's decision).[17]

III. The Writs Of Certiorari Should Be Dismissed Without Vacating The Decisions Below

A. The proper disposition of appeals that have become moot turns on the "equitable tradition of vacatur." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). The doctrine is "based solely upon determining what will be 'most consonant to justice' in view of the conditions and circumstances of the particular case," including "the nature and character of the conditions which have caused the case to become moot." *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916) (quoting *South Spring Hill Gold Min. Co.* v. *Amador Medean Gold Min. Co.*, 145 U.S. 300, 302 (1892)); *see also* 28 U.S.C. § 2106.

One of the amici before this Court, relying on *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), asserts that "vacatur is the rule, and letting the lower court decision stand is the exception." CJLF Amicus Br. 16. In fact, the law is to the contrary. As the Court concluded unanimously in *U.S. Bancorp*, "[i]t is petitioner's burden, as the party seeking relief from the status quo of the appellate judgment, to demonstrate not merely equivalent responsibility for the mootness, but equitable entitlement to the extraordinary remedy of vacatur." 513 U.S. at 26. This principle follows not

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[17] These appeals are also not within the exception for "voluntary cessation," for the straightforward reason that the relevant provisions of EO-2 either have expired or will soon expire by their own terms and as intended. The government "has not voluntarily ceased anything," *Rendell*, 484 F.3d at 243, *e.g.*, by repealing or declining to implement the contested provisions.

only from considerations of fairness, but also because "'[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'" *Id.* at 26-27 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)). Otherwise, "[t]o allow a party ... to employ the secondary remedy of vacatur as a refined form of collateral attack on the judgment would—quite apart from any considerations of fairness to the parties—disturb the ordinary operation of the federal judicial system." *Id.* at 27; *see also Alvarez* v. *Smith*, 558 U.S. 87, 94 (2009). Thus, although there are circumstances where a "*Munsingwear* vacatur" is appropriate, it is by no means the default rule or reflexively applied.

B. When considering whether to vacate a lower court judgment where the case has become moot on appeal, "[t]he principal condition to which [this Court has] looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp*, 513 U.S. at 24. In this case, petitioners' voluntary actions are indeed responsible for the mootness of these cases, in three respects.

First, the language of the Executive Order itself is directly responsible for the fact that the challenge at issue in *IRAP* has now become moot, and the one in *Hawaii* will shortly become moot as well. Section 2(c) specifically provides that suspension of entry of nationals from the six designated countries will last "for 90 days from the effective date of this order," and Section 6(a) similarly provides for the suspension of refugee admissions "for 120 days after the effective date of this order." The President adopted these time limits ex-

pressly with an eye toward litigation. *See* EO-2, § 1(i) ("[I]n order to avoid spending additional time pursuing litigation, I am revoking Executive Order 13769 and replacing it with this order[.]"). Thus, whereas a harder case might arise when voluntary actions unrelated to the underlying litigation cause mootness, *see, e.g.*, *U.S. Bancorp*, 513 U.S. at 25 n.3, here, there is a direct and inseparable connection between the two.

Second, the mootness of the government's appeal of the injunctions can also be attributed to the separate voluntary action reflected in the President's June 14 Memorandum, which purported to alter "the effective date of each enjoined provision." JA 1442. That Memorandum was a specific and direct response to mootness concerns that had arisen in the litigation. *See id.* (stating that the memorandum was drafted "[i]n light of questions in litigation about the effective date of the enjoined provisions and in the interest of clarity"). The Memorandum therefore reflected a decision by the Executive Branch to start the relevant clocks at the moment the enjoined provisions went into effect—while maintaining expiration periods that have now expired or shortly will do so.

Third, although the facts just described created a manifest prospect that the time periods specified in EO-2 would run before resolution of the appeal, the government did not proceed with urgency. Instead, its litigation choices increased the likelihood of mootness. For example, when the government noticed its appeal in *IRAP* on March 17, 2017, that filing triggered this Court's jurisdiction under 28 U.S.C. § 1254(1), *see Hohn* v. *United States*, 524 U.S. 236 (1998), and would have allowed the government to petition for certiorari before judgment under this Court's Rule 11 and seek a stay of the injunction pending the disposition of that petition

(and, indeed, the government filed just such a petition in the *Hawaii* case). Instead, the government waited not only until after the *en banc* Fourth Circuit affirmed the injunction on May 25, but an additional week thereafter before filing its petition with this Court.

Even then, while the government requested expedited briefing and consideration of the petition, it did not do so with respect to the merits. This Court took note. *IRAP*, 137 S. Ct. at 2086 ("The Government has not requested that we expedite consideration of the merits to a greater extent."). *Compare Dames & Moore* v. *Regan*, 453 U.S. 654, 660 (1981) (in litigation arising from Iranian hostage crisis, granting certiorari before judgment and setting expedited briefing upon Solicitor General's request); *United States* v. *Nixon*, 418 U.S. 683, 686-690 (1974) (government requested expedited briefing, petitioned for certiorari before judgment). The government's decision not to seek expedited argument, whether before this Court's summer recess or during a special September sitting, guaranteed that at least 90 days would elapse between any relief on its stay applications and oral argument on the merits—with the mootness consequences outlined above.

When a party decides to invade the legal rights of another party for only a short period of time—a period that ordinarily does not allow for the full scope of appellate litigation, up to and including this Court's disposition after full briefing and argument—the offending party should not be able to have any adverse judgments vacated by virtue of the facts that it chose neither to extend its conduct nor to seek fully expedited review in this Court. "The case is therefore one where the United States, having slept on its rights, now asks [the Court] to do what by orderly procedure it could have done for itself." *Munsingwear*, 340 U.S. at 41.

At its core, *Munsingwear* stands for the proposition that "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp*, 513 U.S. at 25. The mootness of these cases, however, arises not from the "vagaries of circumstance," but from the government's strategic choices. In such circumstances, the "equitable tradition of vacatur" does not support that disposition.

CONCLUSION

The writs of certiorari should be dismissed as moot, and the judgments of the courts of appeals should not be vacated.

Respectfully submitted.

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APPENDICES

APPENDIX

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